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IN THE

Supreme Court of the United States

October Term, 1962.

No. 880.

SLOAN'S MOVING & STORAGE CO., INC.,
Appellant,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,
Appellees,

and

UNITED PARCEL SERVICE, INC.,
Intervenor-Appellee.

On Appeal From the Judgment of the United States District Court for the Eastern District of Missouri, E. D.

MOTION TO AFFIRM.

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UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,
Appellees,

AND

UNITED PARCEL SERVICE, INC.,
Intervenor-Appellee.

ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI, E. D.

MOTION TO AFFIRM.

United Parcel Service, Inc., Intervenor-Appellee, pursuant to Rule 16(1)(c) of the Revised Rules of the Supreme Court of the United States, moves that the final judgment and decree of the District Court be affirmed.

STATEMENT.

This is an appeal from a final judgment entered pursuant to the unanimous opinion of a three-judge court, constituted in accordance with 28 U. S. C. § 2284. The court had refused to set aside an order of the Interstate Commerce Commission pursuant to which a certificate of public convenience and necessity has been granted to Intervenor-Appellee, United Parcel Service, Inc. (herein "UPS").

This same order of the Commission was carried to this Court on an appeal, subsequently withdrawn, from the decision of a three-judge statutory court in the Southern District of New York, reported at **Railway Express Agency, Inc. v. United States**, 205 F. Supp. 831 (1962), which is also the subject of a Memorandum Decision by Mr. Justice Harlan refusing to issue a temporary restraining order. 7 L. Ed. 2d 432, 82 S. Ct. 466 (1962).

The certificate issued by the Commission authorized UPS to extend the geographical area of its unique package delivery service which has already been fully described to this Court in two other appeals from earlier decisions by district courts, one of which involved a portion of the same territory as is included here. **Railway Express Agency, Inc. v. United States**, 355 U. S. 270 (1957), *affirming per curiam* 153 F. Supp. 738 (S. D. N. Y. 1957); **Yale Transport Corp. v. United States**, 365 U. S. 566 (1961), *affirming per curiam* 185 F. Supp. 96 (S. D. N. Y. 1960).

The instant proceeding began with the application of UPS to the Interstate Commerce Commission for a certificate to operate as a common carrier by motor vehicle of general commodities, with certain exceptions, limited to packages and articles each weighing up to 50 pounds and measuring up to 108 inches in length and girth combined,

between all points in the entire states of Illinois, Indiana, and Ohio, and in parts of Missouri, Iowa, Wisconsin, and Michigan. A significant portion of this territory was already being served by UPS in interstate commerce, and all of the area was being served in either interstate or intrastate commerce or both, when the application was filed.

After 32 days of hearings, on a record of 6391 pages and 402 exhibits, the examiner issued his report in which he recommended granting of the certificate prayed for. Thereafter, on October 27, 1961, upon consideration of the exceptions to the examiner's report, the Commission, by Division 1, issued its report and order granting to UPS the authority which is here challenged. The Commission's order, reported at 89 M. C. C. 709, affirmed and adopted the statement of facts, the conclusions and the findings of the examiner as those of the Commission.[1]

By thus adopting the examiner's report, and in accordance with the requirements of Sections 207 and 210 of the Interstate Commerce Act, 49 U. S. C. §§ 307, 310, the Commission here specifically found (89 M. C. C. 709, 746):

> —that the operation proposed by UPS was required by the public convenience and necessity; and
>
> —that UPS is fit, willing and able properly to perform the service proposed and to conform to the provisions of the Interstate Commerce Act and the requirements, rules and regulations of the Commission thereunder.

Appeals were taken from this order by Railway Express Agency, Inc. in the Southern District of New York and by appellant Sloan's in the Eastern District of Missouri. The complaint of Railway Express was dismissed by a unanimous three-judge statutory court in **Railway**

1. The examiner's report and recommended order is reported as part of the Commission's decision at 89 M. C. C. 711-749.

Express Agency, Inc. v. United States, *supra*, 205 F. Supp. 831. An appeal to this Court from that judgment was withdrawn. The judgment of the statutory court in the Eastern District of Missouri, dismissing the complaint of Sloan's, is now before this Court.

Sloan's instituted the present action in the court below on January 4, 1962, seeking to set aside and enjoin the Commission's order of October 27, 1961. In this action, Sloan's did not deny that there is an almost unlimited number of manufacturers, wholesalers and commercial shippers, generally engaged in inter-business distribution, located throughout the proposed extended territory, who were using United States parcel post as their normal transportation medium for small package shipments. Sloan's further did not challenge the Commission's finding that parcel post service falls far short of meeting the business needs of these small package shippers (89 M. C. C. 737). Finally, Sloan's did not dispute the finding that the service rendered by UPS is far superior to parcel post in substantial respects, and obviates the parcel post problems and service deficiencies of which manufacturers and other wholesalers so earnestly complain (89 M. C. C. 737).

Rather, Sloan's based its attack principally on the following contentions:

First, Sloan's made the usual attack against the Commission's exercise of its traditional fact finding function, asserting that there was not substantial evidence to support two basic findings of fact made by the Commission, namely; (a) that Sloan's service does not meet the proved need for a reasonable and practicable alternative to parcel post throughout the entire territory described above, even though Sloan's has limited interstate authority between St. Louis on the one hand, and, on the other, a small area in Missouri and Illinois; and (b) that only a very small portion of Sloan's overall traffic is exposed to diversion to UPS, which does meet that need, and such exposure

is with respect to a type of traffic as to which Sloan's has demonstrated an ability to withstand the competition of UPS in areas where both companies operate (89 M. C. C. 741).

As a second and collateral attack on the order of the Commission, Sloan's argued that a control relationship has existed for over 20 years between UPS, its parent, and affiliated carriers, which has not been approved under Section 5 of the Interstate Commerce Act, 49 U. S. C. § 5, and that such approval should have been a condition precedent to the granting of the certificate in this case. Significantly, this argument was not made before the Commission in the instant case. It was first raised by the complaint filed in the court below. However, the identical contention had been made to the Commission in an earlier case, and to the courts on review of the Commission's order there. In that proceeding, the assertion of unlawful control in the UPS corporate family was thoroughly analyzed and firmly rejected. **Yale Transport Corp. v. United States**, *supra*, 185 F. Supp. 96, *aff'd per curiam*, 365 U. S. 566, *affirming* **United Parcel Service of New York, Inc.**, 79 M. C. C. 629 (1959).

In the instant case, the three-judge statutory court below, in a detailed and well-reasoned opinion by Circuit Judge Van Oosterhout, reported at 208 F. Supp. 567, unanimously dismissed the complaint (J. St. 22-34), holding that:

1. The findings of fact of the examiner and the Commission with respect to public convenience and necessity were supported by substantial evidence and such findings support the Commission's order authorizing the issuance of a certificate (J. St. 28).

2. There was no unlawful control relationship in the United Parcel Service family which would affect the Commission's jurisdiction to grant a certificate to UPS (J. St. 32-33).

ARGUMENT.

The unanimous decision of the court below, approving the issuance of a certificate of public convenience and necessity to UPS after lengthy proceedings before the Commission and a full presentation before the court, is clearly correct under the provisions of the Interstate Commerce Act, the governing case law, and long established administrative practice.

1. The Evidence Fully Supports the Findings and Conclusion of the Commission That There Is Public Need for the Service of UPS Throughout the Entire Midwestern Area.

Sloan's assumes a very heavy burden when it attacks the Commission's order authorizing the issuance of a certificate of public convenience and necessity to UPS. Significantly, Sloan's does not dispute the finding that the principal medium for small package shipments prior to inauguration of UPS' service was parcel post, and that in many important respects parcel post service is unsatisfactory, inconvenient and inadequate for commercial shippers (89 M. C. C. 737). Nevertheless, Sloan's would have the Court ignore the deficiencies of parcel post and of existing carriers, and find that the 193 public witnesses who testified concerning their urgent need for the proposed service are not to be believed. Sloan's also would have the Court find, contrary to the evidence, that its service is "identical with that which United proposed" (J. St. 6), and that Sloan's limited service would in some fashion fill the proven need in this territory.

In his report, the examiner carefully analyzed the evidence of need for UPS' service, *inter alia*, as follows:

> "* * * The wholesale service [of UPS] is a common carrier service involving principally the delivery

of small packages from manufacturers, wholesalers, and distributors to their customers. This is the type of service which applicant now performs under its common carrier authority from Chicago and which it proposes to render under the certificate sought herein. * * *" (89 M. C. C. 713.)

"A comparison of the proposed operation with that of parcel post shows that the former has many service advantages over the latter [listing them]. * * *" (89 M. C. C. 718.)

"Evidence in support of the application was adduced by 193 public witnesses representing both large and small manufacturers and wholesale business establishments. The presentation of further evidence of this nature was terminated by a ruling of the examiner, in conformity with rule 1.76 of the Commission's Rules of Practice, that further evidence of this character would be cumulative. * * *" (89 M. C. C. 720.)

"All of the supporting shippers [including 23 from Missouri] now use parcel post to transport packages from their places of business to points in the considered territory. Dissatisfaction was expressed with the service provided by parcel post for a number of reasons [listing them]. * * * The shippers who had used applicant within the scope of its present authority expressed complete satisfaction with the service afforded, and all of the supporting companies asserted that applicant's service would be used to handle shipments now transported by parcel post if the application is granted. * * *" (89 M. C. C. 720-721.)

As the examiner's analysis shows, it is conclusively established in this record that shippers in all parts of this midwestern area require the type of fast, dependable, economical and efficient delivery service offered by UPS, as a

practical alternative to unsatisfactory parcel post for their interstate shipments destined to all portions of the proposed territory.

After reviewing the "extensive material evidence bearing upon public convenience and necessity", the court below affirmed the order of the Commission as follows (J. St. 28):

> "• • • Our examination of the record satisfies us that the essential findings made by the examiner and adopted by the Commission are supported by substantial evidence and that such findings support the Commission's order authorizing the certificate."

Nevertheless, in its Jurisdictional Statement, Sloan's makes many extravagant statements—without any references to the record—in a futile attempt to imply that no need for interstate service to and from Missouri points was established (*e.g.*, pp. 7, 10, 11). The record is replete with support of the Commission's findings and of the conclusion of the court below on this point. We refer briefly to some of the voluminous evidence of need for applicant's service in the very area in which Sloan's has an interstate certificate:

1. Twenty-three shippers testified to their need for UPS' service from Missouri points to points both within and beyond the area served by Sloan's in interstate commerce (Tr. 708, 1015, 1133, 1338, 1359, 1384, 1416, 1480, 1604, 1679, 1797, 1866, 1883, 2174, 2219, 2230, 2332, 2389, 2442, 2604, 2629, 2714, 2849). Most of these witnesses listed, either orally or in exhibit form, the typical points to which their package shipments would be sent by UPS throughout the proposed midwestern area, including specifically many points in southwestern Illinois—the only area authorized to be served by Sloan's from Missouri (*e.g.*, Tr. 715; Ex. 97 [Tr. 712, 719]; Ex. 115 [Tr. 1139, 1148], Ex. 123 [Tr. 1365, 137[illegible] Ex. 133 [Tr. 1613, 1620]; Ex. 137 [Tr. 1683, 1701].

2. Exhibit 83 (Tr. 350, 367) demonstrates that shippers, who were at the time of the hearings already using UPS intrastate in Missouri, sent 3,068 packages in only one day via parcel post to destinations beyond Missouri covered by this application, including the limited area in southwestern Illinois authorized to be served by Sloan's.

3. Witnesses from every portion of this territory beyond Missouri gave evidence that they shipped hundreds of parcel post packages every week to Missouri points, including those served by Sloan's. Such testimony was given by witnesses who ship from such representative points, to name only a few, as: Chicago, Belleville, Jacksonville, Springfield, Peoria, Wheaton, Odin, Kankakee and Rockford, in Illinois; Bourbon, Westville, Indianapolis, South Bend, Madison, and Salem, in Indiana; Ravenna, Fremont, Lockland, Cincinnati and North Canton, in Ohio; Lansing, Livonia, Saginaw, and Kalamazoo, in Michigan; Davenport, Iowa; and Bristol, Wisconsin (Tr. 471, 487, 500, 523, 535, 615, 754, 782, 831, 843, 1196, 1211, 1392, 1459, 1953, 2003, 2214, 2315, 2344, 2389, 2469, 2555, 2570, 2833).

4. Exhibit 83 (Tr. 350, 367) also shows that shippers in the proposed area beyond Missouri, who were using UPS at the time of the hearings, sent a total of 3,409 packages via parcel post to Missouri points on just one day.

The record leaves no room for doubt as to the strong need for UPS' service from and to Missouri points. And, as we point out below, the record is equally conclusive that Sloan's is unable to meet that need.

2. There Is Substantial Evidence to Support the Commission's Determination That the Service of Sloan's Is Not Adequate to Meet the Need Shown Here and That Its Service Would Not Be Impaired by Granting the Certificate to UPS.

The record conclusively shows that Sloan's cannot fill the demonstrated need for transportation of parcel post type shipments from all over the area involved to Missouri points (*e.g.*, Tr. 5921, 5924, 5968); cannot fill the full outbound need of even St. Louis shippers, who are the only Missouri shippers Sloan's is authorized to serve in interstate commerce (*e.g.*, Tr. 708, 1015, 1133, 1338, 1359); has not been able to satisfy the needs of witnesses appearing in this proceeding who actually have used Sloan's service (*e.g.*, Tr. 721, 1154, 1871, 2181, 2721); and has not shown an ability to attract the enormous parcel post traffic of the supporting witnesses despite their dissatisfaction with parcel post (*e.g.*, Tr. 695, 1137, 1420, 1482, 1681).

A similar finding based upon the failure of existing carriers to attract parcel post traffic, considered sufficient to justify a grant of this same type of authority to United Parcel Service in another area, was made in **United Parcel Service of New York, Inc.**, *supra*, 79 M. C. C. 629, and was upheld in **Yale Transport Corp. v. United States**, *supra*, 185 F. Supp. 96, *aff'd per curiam*, 365 U. S. 566. There, the Commission had said (79 M. C. C. at 652):

> "* * * The large volume of parcel post traffic in and of itself serves as an indictment of existing services in the small-package field. * * *"

From the record in the present proceeding, the Commission concluded as follows (89 M. C. C. 741):

> "* * * As seen, even with the authority recently granted, this carrier [Sloan's] can only transport pack-

ages between St. Louis, on the one hand, and, on the other, very limited areas in Missouri and Illinois. Because of the territorial limitations in its authority, Sloan's cannot provide the complete service which is proposed by applicant and shown to be needed. All factors considered, it is concluded that the evidence submitted by Sloan's does not warrant a partial denial of the application. * * *"

Twenty-three public witnesses from Missouri testified in support of this application. Several of these witnesses had actually used Sloan's service and had found it unsatisfactory (Tr. 721, 1153, 1871, 2720). Deficiencies in the service of Sloan's, testified to by the shipper representatives, include the following:

1. Pickup calls are made at irregular hours or not at all (Tr. 721, 1154, 1171, 2721).

2. Automatic pickup service is refused for shippers not having packages every day (Tr. 1871).

3. Delivery service is slow and erratic (Tr. 721, 1154, 1456), and shipments arrive in poor condition (Tr. 2181).

4. Delivery is refused to out-of-the-way points, even though on Sloan's "points served" list (Tr. 723).

5. Tracing of shipments is difficult (Tr. 1154, 2181).

6. Vehicles are permitted to be operated in a "beat-up condition" and drivers are discourteous and unkempt in appearance (Tr. 1154, 1871).

Contrary to the efforts of Sloan's to deprecate these complaints of shippers, they were not "nebulous and factitious" (J. St. 7), but substantial criticisms of Sloan's service.

In addition, the record shows that Sloan's cannot provide an adequate interstate service to Missouri points (Tr. 5921). Shippers in Chicago, Indianapolis, Milwaukee, or Cincinnati, for example, having small packages destined to Missouri points, can use Sloan's only by shipping to Sloan's in St. Louis by regular freight hauler, and then having Sloan's make the local delivery. The same is true of the many public witnesses situated in the smaller communities throughout Wisconsin, Illinois, Indiana, Ohio and Michigan. For reasons made clear in the record, such service is feasible only for shippers with large volume, such as the Chicago retail mail order houses which Sloan's serves in this manner (Tr. 5924, 5968).

Another serious deficiency in Sloan's service is that it cannot meet the needs of shippers of small packages for a service outbound from St. Louis which will cover the entire midwestern commercial trading area involved in UPS' application. The 23 public witnesses from Missouri all made it clear that they need a territorial package delivery service which will cover their commercial trading area in the midwest (*e.g.*, Tr. 711, 1016, 1482, 1682). The present delivery territory served by Sloan's is narrowly circumscribed, and a recent extension adds to that area only a relatively few square miles in southwestern Illinois. Further, Sloan's is authorized to pick up shipments only in St. Louis and nowhere else in Missouri.

Since Sloan's cannot fill the need shown here, the conclusion of the Commission is clearly correct (89 M. C. C. 741).

Sloan's also disputes the finding by the Commission that only a small portion of Sloan's traffic is exposed to diversion, and that Sloan's has demonstrated an ability to withstand the competition of UPS as to this class of traffic (89 M. C. C. 741).

It is hornbook law that the Interstate Commerce Act guarantees no motor carrier a monopoly. Even if some diversion from an existing carrier were to occur, the public convenience and necessity may still require that the service proposed by an applicant be authorized.

As summarized in **Norfolk Southern Bus Corp. v. United States**, 96 F. Supp. 756, 761 (E. D. Va. 1950), *aff'd*, 340 U. S. 802 (1950), both the courts and the Commission have long recognized that:

> "Competition among public carriers may be in the public interest and the carrier first in business has no immunity against future competition. * * * Even though the resulting competition causes a decrease of revenue from one of the carriers, the public convenience and necessity may be served by the issuance of a certificate to a new competitor. * * *"

Even if this were not the law, there is no evidence whatever to support the unjustified inference which Sloan's would have the Court draw that some St. Louis carriers have "gone bankrupt" (J. St. 14), or even been subject to any measurable diversion, as a result of competing with UPS. Rather, the failure of any carrier to prove that it suffered any material loss of traffic after inauguration of the unique service of UPS in any area, logically supports the conclusion that UPS obtains substantially all of its packages from the parcel post system.

It is the duty of the Commission to find the facts, to "exercise its judgment to determine public convenience and necessity", and "to draw its conclusion from the infinite variety of circumstances which may occur in specific instances." **Interstate Commerce Comm'n v. Parker**, 326 U. S. 60, 65 (1945). In the instant case, the Commission has precisely exercised the power vested in it by Congress.

The Commission's findings (89 M. C. C. 741) that only a very small segment of Sloan's traffic is even vulnerable to diversion to UPS, and that Sloan's has demonstrated its ability to withstand the competition of UPS are amply supported by the whole record. In fact, these findings are inescapable from a reading of the testimony of the shipper witnesses and a consideration of the evidence of Sloan's itself.

Sloan's operates interstate as a common carrier of packages from St. Louis to points in St. Louis and St. Charles Counties, Missouri, and between St. Louis, on the one hand, and, on the other, points in Illinois within a radius of about 70 miles of St. Louis (Tr. 5921; Exhibit 350 [Tr. 6035, 6036]). It also conducts an intrastate package delivery service. In addition, Sloan's, as its corporate name indicates, is in the moving and storage business, handling household goods, and it also operates trucks and trailers in general freight hauling (Tr. 5911). In 1959, moving and storage operations and general freight hauling accounted for 50% of its revenue and 50% of its profits (Tr. 6012).

In both its interstate and intrastate package delivery service, Sloan's handles deliveries for retail stores and retail mail order houses (until recently its sole package business) as well as for wholesale shippers. The president of Sloan's testified that the retail delivery business accounts for approximately 75% of the total packages handled (Tr. 6012). Because of the restriction against service for retail stores imposed on UPS' authority here, none of those packages could be subject to diversion to UPS.

A survey of all packages handled by Sloan's during the ten-day period, June 20 to July 1, 1960, inclusive, was introduced as Exhibit 346 (Tr. 5963, 6034). It showed that only 13.9% of all packages surveyed were interstate shipments from wholesale accounts delivered in the area here involved. **Thus, less than 14% of the packages transported by Sloan's could have been even theoretically subject to the possibility of diversion to UPS.**

However, the record is entirely clear that no material part of even this relatively small proportion of packages would be diverted to UPS in the new service. The evidence shows conclusively that Sloan's has proved its ability to withstand the competition of UPS. Both UPS and Sloan's began in February, 1958, their respective wholesale parcel delivery services in intrastate commerce in Missouri (Tr. 6000-01). As reflected by a comparison of Exhibit 60 (Tr. 156, 1010) and Exhibit 331 (Tr. 5917, 6034), UPS served a much larger area in Missouri than did Sloan's at the time of these hearings (Tr. 6002). In spite of the wider coverage of UPS operations, Sloan's had developed its new wholesale package delivery business (as distinguished from its older, well-established retail store delivery business) to the point where, in a test period, 2,995 of a total of 20,356 packages were handled for wholesale shippers by Sloan's intrastate and in the St. Louis commercial zone, where UPS already offered service, which was a greater percentage of wholesale packages transported in competition with UPS than Sloan's enjoyed interstate at the time Sloan's made its study of packages allegedly subject to diversion to UPS.[2]

Consequently, the record fully supports the following conclusion of the Commission (89 M. C. C. 741):

"* * * Only a very small part of Sloan's overall traffic is exposed to diversion to applicant, and such

2. Of a total of 25,878 parcels surveyed over a ten-day period, 6,589 were purportedly handled for wholesale shippers (Ex. 349 [Tr. 5982, 6034]); and of these, 3,594 were delivered in interstate commerce beyond the St. Louis commercial zone (Ex. 346 [Tr. 5963, 6034]). Consequently, 2,995 were delivered intrastate and in the commercial zone for such wholesale shippers. Of the total of 25,878 parcels surveyed, 5,522 were handled for all types of shippers in interstate service beyond the commercial zone of St. Louis, (Ex. 346). Thus, 20,356 parcels were handled intrastate and in the commercial zone, of which 2,995 or 14.7% were delivered for wholesale shippers. All of these were already subject to possible diversion by United Parcel Service, but obviously they had not been lost by Sloan's.

exposure is with respect to a type of traffic as to which Sloan's has demonstrated an ability to withstand applicant's competition in intrastate commerce and in the St. Louis commercial zone. * * *"

The Commission's findings and conclusion on this issue in this case are identical to those of the Commission in **United Parcel Service of New York, Inc.**, *supra*, 79 M. C. C. 629, with respect to other carriers operating in another section of the country. There the Commission stated (p. 653):

> "Although the opposing carriers maintained that a grant of this application will adversely affect their operations, we are not convinced that such a result necessarily would ensue. * * * Of those carriers shown to be active in the movement of small packages, it appears that they have already demonstrated an ability to withstand the applicant's competition * * * on the same type of traffic. * * *"

The findings and conclusion of the Commission in that case were upheld by the courts. **Yale Transport Corp. v. United States**, *supra*, 185 F. Supp. 96, *aff'd per curiam*, 365 U. S. 56.

Sloan's argument in this respect is also similar to that rejected in 1957 in a case involving the grant to UPS of similar authority (from Chicago to all or parts of five midwestern states) on a comparable record. **Railway Express Agency, Inc. v. United States**, *supra*, 153 F. Supp. 738, *aff'd per curiam*, 355 U. S. 270.

Sloan's has elected to ignore the evidence on which the grant of the certificate was based, and therefore asks this Court to assume that the Commission did not properly weigh the voluminous evidence before it. However, the 48-page opinion of the Commission reflects a careful

and diligent study of the extensive record, and presents convincing proof of the validity of the conclusion reached by the Commission that the service proposed by UPS is required by the public convenience and necessity (89 M. C. C. 746).

Sloan's has not only ignored the findings on which the grant of the certificate was based, but it has also made the unwarranted assumption that the court below did not properly exercise its function of review. It is well settled that, where the order granting the certificate was within the Commission's statutory power, it may not be set aside unless it is clearly erroneous as a matter of law, or is not supported by any substantial evidence. **United States v. Pierce Auto Freight Lines, Inc**, 327 U. S. 515, 535-536 (1946). Sloan's does not deny that the ultimate findings required by law were explicitly made in terms of the statutory language. Furthermore, the comprehensive and careful report of the Commission clearly shows that full consideration was given to every fact made relevant by the applicable sections of the Interstate Commerce Act. The record of 6,391 pages and 402 exhibits, introduced in the course of 32 hearing days, contains ample evidence to support those findings.

The opinion below reflects an independent and diligent study by the court of the extensive record which presents convincing proof of the validity of the conclusions reached by the Commission.

3. The Commission's Ruling on the Legality of the Relationship Between UPS, Its Parent and Other Subsidiary Carriers Has Been Judicially Approved and the Court Below Properly Refused to Reconsider the Issue in This Action.

In this appeal, Sloan's seeks to set aside the grant of a certificate of public convenience and necessity. However, Sloan's devotes five pages of its Jurisdictional Statement

to an attack which is not directed against any of the findings that form the basis of the Commission's grant of the certificate. Rather, Sloan's argument is that assertedly improper control relationships exist among members of the United Parcel Service corporate family, in violation of Section 5 of the Interstate Commerce Act, 49 U. S. C. § 5.

Sloan's asserts that United Parcel Service of America, Inc., a Delaware corporation which owns all of the stock of UPS, and the other carriers in the United Parcel Service family under the same ownership and control, should all have been parties to the instant application, and that Commission approval of the corporate control relationships involved should have been sought in connection with the application.

Sloan's contention is founded on the premise, already found by courts and the Commission to be erroneous, that certain control relationships among UPS, its affiliated carriers, and their common parent require approval under Section 5(2) of the Interstate Commerce Act, 49 U. S. C. § 5(2),[3] and that they have not received that approval from the Commission. Sloan's argues from this assumption that the failure to secure such approval should have been a bar to issuance of the certificate to UPS in this case.

As the court below found (J. St. 32), this contention was **never properly presented to the Commission** below, either during the hearings or in the briefs to the examiner and the Commission. The statement to the contrary in Sloan's Jurisdictional Statement (p. 19) refers only to a

3. Section 5(2) of the Interstate Commerce Act, 49 U. S. C. § 5(2), provides, *inter alia*: "(2)(a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b)—(i) * * * for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; * * *."

question asked of UPS' operating witness on cross-examination as to whether or not a Section 5 application had been made by UPS' corporate parent in connection with its ownership of UPS and affiliated United Parcel Service operating companies (Tr. 993-994). Certainly, asking this question of a witness did not constitute raising the control issue, as Sloan's contends. Apparently, Railway Express did not so consider it, since the issue was not argued in its appeal from this same order of the Commission in **Railway Express Agency, Inc. v. United States**, *supra*, 205 F. Supp. 831.

The law is clear that the courts, on review of an order of the Commission, may not entertain any argument on an issue which was not raised in the proceedings before the Commission. **United States v. L. A. Tucker Truck Lines, Inc.**, 344 U. S. 33 (1952). Here, as in the **Tucker** case (p. 36), "The issue is clearly an afterthought, brought forward at the last possible moment to undo the administrative proceedings without consideration of the merits * * *." In such circumstances, the court below properly held that the unlawful control issue to the extent it goes beyond the jurisdictional issue was not properly before the Court (J. St. 33).

But, even if the merits of this contention had been properly raised before the Commission, they clearly would still be lacking in merit. The Commission and the courts have ruled in two prior proceedings that no control relationship requiring approval under Section 5 of the Interstate Commerce Act is present in the case of the United Parcel group of carriers.

Specifically, Sloan's argues that certain allegedly unlawful intercorporate relationships involving the UPS Pennsylvania and Oregon affiliates (relationships which have admittedly existed for over 20 years) should have been approved pursuant to Section 5 as a condition precedent to issuing the certificate in this case. These identical charges were directly raised by a complaint filed

with the Commission on August 25, 1959, against United Parcel Service in **Yale Transport Corp. v. United Parcel Service of America, Inc.**, Docket No. MC-F-7321. The Commission dismissed the complaint on March 3, 1960. In so doing, and later in denying reconsideration of its order dismissing the complaint, the Commission held that the very relationship between UPS and its affiliated United Parcel Service companies of which Sloan's here complains did not require Section 5 approval, and that institution of a Section 5 proceeding would be unreasonable.

Wholly independent of the Commission's action in the complaint proceeding, a three-judge statutory court in **Yale Transport Corp. v. United States**, *supra*, 185 F. Supp. 96, *aff'd per curiam*, 365 U. S. 566, considered the same claims of illegal control in the United Parcel group and found them completely without merit. That court concluded—as did the Commission in the complaint proceeding—that there was no such control relationship in the United Parcel Service family as would require approval under Section 5.

The holding by the statutory court in **Yale Transport**, *affirmed per curiam* by this Court, is pertinent here. In that case, Circuit Judge Friendly said (185 F. Supp. at 105-106):

> "The other two allegedly unlawful control situations concern operations unrelated to the areas here involved. Protestants claim that the Commission granted a 1938 application for a contract carrier permit for United Parcel Service of Pennsylvania, Inc., 10 M. C. C. 83 (1938), which thereby became a carrier for the first time, without the parent UPSA having applied for approval of control as was later held to be required when the Commission in the M. J. Hannon case, supra, adopted the rule of the Pan American case. If the Commission is concerned about this

omission understandably made a score of years ago, § 5(7) affords a remedy; but **this did not forbid the issuance of a certificate here**, even if we assume that protestants have standing to raise the question. The other alleged illegality is that in proceedings wherein the Commission allowed United Parcel Service of Portland, Oregon, to purchase the operating rights of A. J. Wiese, 37 M. C. C. 473 (1941), and approved the acquisition of control of the Portland company by United Parcel Service of America, Inc., a Nevada corporation, UPSA, which owned all of the stock of the Nevada corporation, did not join as an applicant, as United States v. Marshall Transport Co., supra, later held it should. However, the Supreme Court has said in Alleghany Corp. v. Breswick & Co., 1957, 353 U. S. 151, 171, 77 S. Ct. 763, that although the Commission may require the ultimate parent to be joined as an applicant, such joinder is not jurisdictional and lack of it does not make the Commission's grant of approval unlawful. Even if the case were otherwise, the same considerations stated in connection with the Pennsylvania company would deprive the argument of effect here." (Emphasis added.)

Sloan's, in its Jurisdictional Statement (p. 20), implicitly recognizes that this Section 5 issue has already been decided:

"* * * Concededly, the Section 5 issue was presented to the United States District Court for the Southern District of New York in *Yale Transport Corp. v. United States, supra,* and was rejected by that Court. On appeal, the United States Supreme Court affirmed the decision of the United States District Court (Mr. Justice Black 'dissenting') and a petition for a rehearing was denied by the Supreme Court [365 U. S. 566 (1961), 366 U. S. 947 (1961)]. * * *"

In a transparent effort to circumvent the clear authority of **Yale Transport**, Sloan's here contends that a single question asked in the hearings before the Commission allegedly put United Parcel Service of America, Inc. and its subsidiary carriers on notice that the grant of the application here sought would require approval under Section 5 of the control relationships existing within the United Parcel family (J. St. 20). This assertion was firmly rejected by the court below (J. St. 32). But, even assuming, *arguendo*, that the issue was properly raised, this contention, of course, presupposes the existence of an unlawful control relationship. It has already been held that no unlawful relationship exists in the United Parcel Service group of carriers. Consequently, Sloan's argument amonnts to nothing more than a repetition of the arguments made both in the **Yale Transport** court case and in the Commission complaint proceeding. These arguments have all been finally and conclusively determined by the Commission and by the three-judge court in the Southern District of New York, and that court's decision has been affirmed by this Court. All these determinations have been adverse to Sloan's position here.

Even if it be assumed, *arguendo*, that the acquisition of the certificate by UPS in this case did invoke Section 5, Sloan's contention that the certificate which was issued here should be withdrawn would still not be tenable. As Circuit Judge Friendly pointed out in the **Yale Transport** case, citing **Pan American Airways Co. v. Civil Aeronautics Bd.**, 121 F. 2d 810 (2d Cir. 1941), a certificate may issue before a control proceeding is held. See also, **American Trucking Ass'ns v. United States**, 355 U. S. 141 (1957).

But this issue does not arise here, since Sloan's allegations with respect to UPS do not present any Section 5 question in the first place. **Yale Transport Corp. v. United**

added here. Accordingly, the court below properly rejected Sloan's contention that the Commission lacked jurisdiction to issue the certificate to UPS.

CONCLUSION.

The Commission in granting the certificate to UPS, and the court in sustaining that grant, have followed long standing and well recognized precedents. In refusing to accept appellant's novel departures from accepted practices and in determining in favor of UPS each issue advanced by appellant, the Commission and the court below acted under clear and established principles of law.

We respectfully submit that appellant has not presented any substantial question for decision by this Court, and the judgment of the unanimous court below should be affirmed.

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